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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In Re:

BRAUEREIHAUS, INC.,

DEBTOR.

ROBERT L. BAER, Trustee,

PLAINTIFF,

v.

**CAPTEC FINANCIAL GROUP, INC.,
*et al.,***

DEFENDANTS.

**CASE NO. 97-40001-7
CHAPTER 7**

ADV. NO. 97-7023

**MEMORANDUM OF DECISION DETERMINING PERSONAL PROPERTY
TAX OBLIGATION OWED TO BOARD OF COUNTY COMMISSIONERS
OF DOUGLAS COUNTY, KANSAS, IS A PREPETITION CLAIM
SECURED BY AN AVOIDABLE LIEN**

This proceeding was initially commenced by the plaintiff-trustee's response to certain motions for stay relief. The plaintiff later filed an amended complaint that sought, among other things, a determination that the Board of County Commissioners of Douglas County, Kansas ("the Board"), had a statutory lien on some of the debtor's personal property for a prepetition property tax, that the plaintiff could avoid that lien pursuant to 11 U.S.C.A. §545, and that the lien would be preserved for the benefit of the estate pursuant to §551. The proceeding now comes before the Court on the Board's motion for summary judgment. The Board appears by counsel John M. Knox of Riling, Burkhead & Nitcher, Chartered, of Lawrence, Kansas. The plaintiff-trustee appears by counsel

Robert L. Baer of Cosgrove, Webb & Oman of Topeka, Kansas. The Court has reviewed the relevant pleadings and is now ready to rule.

FACTS

As of January 1, 1997, the debtor had an interest in certain personal property then located in Douglas County, Kansas. The debtor also had an interest in some real property, but the parties indicate they have resolved the question of the debtor's and the estate's liability for the *ad valorem* tax on that property. On January 2, 1997, an involuntary chapter 7 bankruptcy petition was filed against the debtor, and the personal property located in Douglas County became property of the bankruptcy estate that was created by that filing, *see 11 U.S.C.A. §541(a)*. The debtor did not respond to the petition. The plaintiff was appointed to serve as the trustee of the bankruptcy estate, and an order for relief was entered on February 5.

DISCUSSION AND CONCLUSIONS

Although only the Board has asked for summary judgment, there are no relevant disputed facts, so the status of the liability for the tax on the debtor's personal property is a question of law that the Court may decide in either party's favor without a formal request from the plaintiff-trustee for summary judgment. The Board's motion raises two questions: (1) whether the obligation owed to the Board for the personal property tax is a prepetition priority claim or a postpetition administrative expense; and (2) whether the Board has a lien on the personal property for the tax owed on it. The Board argues that the tax is a postpetition administrative expense of the bankruptcy estate, and that it has no lien for the

tax, in the process conceding that, pursuant to 11 U.S.C.A. §545(1), the plaintiff could avoid any lien it has. The Court cannot agree with either of the Board's assertions.

The Board first argues the obligation to pay the personal property tax is a postpetition administrative expense of the bankruptcy estate. A few years ago, this Court reviewed 11 U.S.C.A. §§502(i), 503(b)(1)(B)(i), and 507(a)(8)(B), the provisions specifying whether a property tax is an administrative expense or a priority claim, and concluded that: "a claim for a property tax must be considered to be 'incurred' under §503 or 'assessed' under §507(a)(8)(B) as soon as the debtor (or the debtor's property, if the tax is collectible only from the property) is necessarily liable to pay it." *Baer v. Board of County Commissioners (In re Prairie Mining, Inc.)*, 194 B.R. 248, 258 (Bankr.D.Kan. 1996). When that occurred for the tax at issue here is determined by state law. In Kansas, all tangible personal property subject to taxation must be listed and assessed as of January 1 in the owner's name, *K.S.A. 79-301*, and a subsequent transfer does not authorize the owner to omit the property from the required list, *K.S.A. 79-309*. The Court is aware of no way that a taxpayer can later avoid owing the tax on the personal property it owned on January 1. Consequently, the Court concludes that the Board's claim for personal property taxes for 1997 arose on January 1, the day before the involuntary petition was filed against the debtor, and that the taxes are therefore a priority claim under 11 U.S.C.A. §507(a)(8)(B), not a postpetition administrative expense under §503.

The Board also argues that it has no lien on the debtor's personal property, so there is no lien for the plaintiff to avoid under 11 U.S.C.A. §545(1). The Board correctly points out that it obtained no lien on the debtor's personal property under *K.S.A. 79-2020*, *-2109*, or *-2110*, because the transfer of the debtor's property to the bankruptcy estate was not voluntary in this involuntary bankruptcy case.

This fact prevents the direct application of the ruling in *Board of County Commissioners v. Knights Athletic Goods, Inc. (In re Knights Athletic Goods, Inc.)*, 98 B.R. 553,555-56 (D.Kan. 1989), that a tax lien arises under K.S.A. 79-2020 when a debtor files a voluntary bankruptcy petition, and the subsequent ruling in *Sorenson v. Board of County Commissioners (In re Knights Athletic Goods, Inc.)*, 128 B.R. 679, 683-84 (D.Kan. 1991), that the chapter 7 trustee can avoid that lien pursuant to 11 U.S.C.A. §545(1).

The Board does concede that K.S.A. 79-2111 applies to the transfer effected by the involuntary bankruptcy petition, but asserts that this provision does not create a statutory lien. K.S.A. 79-2111 reads:

If the personal property of any taxpayer be seized by any legal process and if the taxpayer does not have a sufficient amount of other property to pay the taxes which is exempt from levy and sale under such legal process, then the taxes on the personal property of such taxpayer shall at once fall due, and be paid from the proceeds of the sale of the property so taken on such legal process, in preference to all other claims against it.

It is not clear, but it appears the Board assumes that a phrase like “the tax . . . shall be a lien upon the property” (found in K.S.A. 79-2109 and -2110) or “a lien shall attach to the property”(found in 79-2020) is required to impose the kind of lien that a chapter 7 trustee may avoid under 11 U.S.C.A. §545(1). The Court cannot agree.

Section 545 provides in pertinent part:

The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien—

(1) first becomes effective against the debtor—

(A) when a case under this title concerning the debtor is commenced; . . . or
(F) at the time of an execution against property of the debtor levied at the instance of an entity other than the holder of such statutory lien.”

For purposes of the Bankruptcy Code, a “lien” is a “charge against or interest in property to secure payment of a debt or performance of an obligation,” 11 U.S.C.A. §101(37), and to the extent relevant here, a “statutory lien” is a “lien arising solely by force of a statute on specified circumstances or conditions . . . ,” §101(53). An involuntary bankruptcy petition certainly commences a case within the meaning of §545(1)(A) and at least arguably constitutes the equivalent of an execution against the debtor’s property within the meaning of §545(1)(F). In any event, the involuntary petition transfers the debtor’s property to a bankruptcy estate, effectively causing the debtor’s personal property to “be seized by . . . legal process,” and K.S.A. 79-2111 then charges unpaid personal property taxes against the proceeds of the property thus seized. While K.S.A. 79-2111 does not use the word “lien,” the Court can see no basis for concluding it does not impose a lien as that word is defined in §101(37) of the Bankruptcy Code. Consequently, similar to the rulings in the *Knights Athletic Goods* opinions about the lien imposed by K.S.A. 79-2020 when a voluntary bankruptcy petition is filed, the Court concludes that K.S.A. 79-2111 imposes a statutory lien when an involuntary bankruptcy petition is filed and that the lien is avoidable under §545(1)(A) or (F) of the Bankruptcy Code.

For these reasons, the Court concludes that the Board has a prepetition claim for the personal property tax that is entitled to priority under 11 U.S.C.A. §507(a)(8)(B), and that its claim is secured by a lien that the plaintiff-trustee may avoid pursuant to §545(1)(A) or (F). The lien is automatically preserved for the benefit of the bankruptcy estate pursuant to §551.

The foregoing constitutes Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure.

Although there may be other claims for relief still pending in this proceeding, the Court also concludes that there is no just reason for delay and will therefore direct entry of a final judgment pursuant to FRBP 7054 and FRCP 54(b) as to the plaintiff-trustee's claims against the Board concerning the personal property tax. That judgment will be entered on a separate document as required by FRBP 9021 and FRCP 58.

Dated at Topeka, Kansas, this ____ day of January, 1999.

JAMES A. PUSATERI
CHIEF BANKRUPTCY JUDGE

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JUDGMENT ON DECISION

This proceeding was before the Court on the motion for summary judgment filed by the Board of County Commissioners of Douglas County, Kansas (“the Board”). The Board appeared by counsel John M. Knox of Riling, Burkhead & Nitcher, Chartered, of Lawrence, Kansas. The plaintiff-trustee appeared by counsel Robert L. Baer of Cosgrove, Webb & Oman of Topeka, Kansas. The Court reviewed the relevant pleadings and has now issued its Memorandum of Decision resolving the parties’ dispute concerning the personal property tax owed on the debtor’s property that was located in Douglas County on January 1, 1997.

For the reasons stated in that Memorandum and because there is no just reason for delay, final judgment is hereby entered declaring that the Board has a prepetition claim for the personal property

tax that is entitled to priority under 11 U.S.C.A. §507(a)(8)(B), that the claim is secured by a lien, and that the lien is hereby avoided pursuant to §545(1)(A) or (F) and is automatically preserved for the benefit of the bankruptcy estate by §551.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this _____ day of January, 1999.

JAMES A. PUSATERI
CHIEF BANKRUPTCY JUDGE